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ABSTRACT

The Constitution mandates that the states take primary responsibility for education. Except for a few specialized institutions, such as the service academies, educational institutions have been chartered, incorporated, licensed and/or authorized to operate by the states. This historical relationship between the states and higher education is outlined. The regulatory function has varied among the states over the years. Regulatory legislation has been influenced by concern to protect citizens against submarginal and fraudulent operations; to protect the integrity of legitimate institutions; development of statewide planning, coordinating and governing boards of public higher education; the question of institutional eligibility of federal funding; increased awareness within the states of the problems growing out of student unrest, and the impact of nontraditional forms of education; the movement for consumer protection in postsecondary education; and the redefinition of the role of states brought about by the Education Amendments of 1972. The trend toward declining enrollments and the resultant competition for students as well as competition for increasingly scarce funds will necessitate new approaches toward regulation and authorization of institutions in the future. (JMF)

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Under the reserve clause of the Constitution the primary responsibility for education rests not with the Federal Government, nor with peer group agencies, but with the states and local governments. Soon after we had become a nation the Congress, through the Northwest Ordinance, provided public lands for the support of education in the new territories and enjoined the states to support forever education for the sake of the happiness of mankind and as essential to good government. (Article III). While the states have developed complex systems of public higher and postsecondary education particularly in the last half of the twentieth century, systems whose roots go back to the early republic with the University of North Carolina in 1795 and the University of Georgia in 1801, they have also from the beginning played a basic role in relation to private higher education. It is in the states and by the states that educational institutions have been chartered, incorporated, licensed and/or authorized to operate. The only exceptions are a few special institutions specifically developed to meet particular national purposes, as for example service academies. Looked at from this standpoint, the involvement of states with the formation of schools and colleges is coextensive with their existence as states; as a matter of fact it antidates their existence as states and goes back to the colonial period. The Colony of Massachusetts not only authorized the first college in America in 1636 but contributed financially to its founding and continued as a state to support it into the first third of the 19th century.

The Regents of the University of the State of New York was established at the first session of the New York State Legislature in 1784 to serve as the trustees or governing board for the reconstituted Kings College as Columbia College and of any other schools or colleges that might be established. The law was revised in 1787 giving Columbia its own trustees but giving supervisory power to the Regents for academies, schools, and colleges

"to enable them to mold the several institutions into a unity that would serve the best interests of the people of the State as a whole".* Thus the Board of Regents was in fact the first state agency established to authorize institutions to operate, to grant degrees, to insure reasonable quality, and, you will note, to insure that they would serve the best interests of the people of the state as a whole.

There certainly has not been anything that might be described as a continuous, complementary, and progressive history since 1784 of state concern with insuring that the several institutions serve the best interests of the people of the states as a whole or of the development of legislation including agencies and criteria to assure it. If there had been there probably would have been no accrediting agencies, no federal problem of institutional eligibility, no diploma mills, no education consumer protection movement, and relatively little national concern with substandard and fraudulent postsecondary institutions of any kind. Given fifty states and several territories there might still be concern about comparability and translation. There still might be need for conferences or sessions like this to compare and refine present practices and on interstate bases inservice education for representatives of the responsible agencies. But the basic problems would not be whether and how to insure minimum probity of new and continuing institutions but how, with the institutions, to insure more effectively that the best interests of the people of the states and the nation were being met.

This obviously did not happen, and there is not much point in speculating further about the "whats" if it had. It might, in fact, not have been a good thing. It could have led not to the kind of wise oversight that on the whole has characterized the Regents, but to conservative forms of control that would have restricted development and diversity. It could, in fact, have brought about fifty ministries of higher education or, postsecondary education, now with all the bureaucracy and regulations that these might entail. As you are well aware when one state, New Hampshire, attempted to change the charter of Dartmouth College on the grounds that the trustees were not sufficiently representative of the State as a whole, the Supreme Court intervened in Dartmouth vs. Woodward (1819) and ruled that the original charter was in fact a contract between the State and the College which the State was without constitutional power to impair. It is significant, however, that the Court did not challenge the basic responsibility of the State to license or charter, or to set the condition under which a charter or license could be granted.

The states historically have taken very different paths. While all of them do incorporate, charter, or license postsecondary educational institutions in some manner, until relatively recently many of them have not taken this function very seriously. In a good many states the only thing necessary to start a school or college was incorporation which could be obtained by an appropriate fee from the secretary of state or similar state official. Incorporating a school was not considered essentially different from incorporating a business enterprise, a situation that persists in a few states today. What is important to keep in mind, however, is that institutions do exist in states, that there are legal conditions for their existence, as minimal

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* Abbott, Frank C., Government Policy and Higher Education. Ithaca: Cornell University Press, 1958. p. 14.

as they may be in some cases and that these must be met if an institution is to operate legally in that state. These conditions never have been challenged and they establish at least minimum state regulatory responsibility over authorization of institutions to operate and to grant degrees.

Serious concern with more effective exercise of this responsibility is a relatively recent phenomenon. The states did become concerned fairly early in this century with the impact of inadequate education on the public in areas related to public health, safety, and welfare. The Flexner Report of 1910 on medical education not only reformed medical education but served as an impetus to state licensing and credentialling of practitioners and of the institutions that prepared them, not just in medicine but in related health fields such as nursing and dentistry. Particularly since World War II, the states, through their legislatures, have become progressively more aware of the need to regulate beyond the requirement of simple incorporation of various types of educational institutions. As you are well aware a number of factors have heightened this awareness and led progressively more states to do something about it.

To some extent the diploma mills, or their equivalents, we probably have had with us always. These range from clearly substandard operations to fly-by-night operations and unscrupulous operators, who, for no more work than that of writing a check, are willing to award a variety of degrees. Their presence was highlighted by the influx of veterans after World War II. While the G.I. Bill provided funds to the states for veterans approval agencies to monitor both institutions and courses, these agencies did reveal a surprising number of substandard and fraudulent operations. It was not just the purveyors of degrees who showed up but proprietors of schools offering skill training, occupational preparation, and short courses in everything from welding to flower arranging.

The late fifties and the sixties was the period of major expansion in higher and postsecondary education. Parents and young people saw in advanced education the key to social mobility, to increased income and to personal fulfillment. During the sixties college populations tripled and with the increase, so also increased the marginal institutions and those who simply wanted to take advantage of a good thing for financial gain. Not only the states but the academic community became progressively concerned. A number of states had adopted regulatory legislation of various types. One of the first attempts to develop model legislation came from the academic community. In 1960 the American Council on Education, in cooperation with the then National Commission on Accrediting, prepared model legislation to control degree mills and additional model legislation for truth in educational advertising. Unfortunately, these did not have much impact. But legislative concern was increasing and more and more states adopted different types of legislation applying to different groups of institutions.

The basic concerns of legislators in those states developing legislation were essentially two: the first and more basic concern was to protect citizens against submarginal and fraudulent operations; the second was to protect the integrity of legitimate institutions against those who would debase the coin of education.

During the late fifties, sixties, and early seventies five additional factors played a significant role:

The first was the development of statewide planning, coordinating and governing boards for public higher education. In 1960 there were twenty-three of these. By the end of the decade there were 47. Today, if one includes executively appointed planning boards, all states and eligible territories have at least statewide planning boards; and in 48 states, plus Puerto Rico, coordinating or governing boards with some responsibilities for planning for the full range of postsecondary education. These boards, to a greater or lesser extent, have had to deal with the issue of submarginal and fraudulent operations and their impact on postsecondary education as a whole.

Second, federal funding and the question of institutional eligibility for federal funds certainly has played an important role. Beginning with the National Defense Education Act of 1958 the tripartite concept of institutional eligibility emerged, although not called that. The first condition of eligibility was, and in subsequent legislation has remained, that an eligible institution was and is legally authorized to operate in its state. The second condition was that the institution be accredited by a nationally accredited agency recognized by the commissioner of education as able to attest to the quality of training offered, or satisfactory assurance of accreditation, or evidence that the institution's credits are accepted by three other institutions which are accredited, or, where no such agency exists, are recognized by the commissioner with the help of a special advisory committee. These provisions, with slight revisions, have been repeated in all major postsecondary education legislation since, including the Education Amendments of 1972. While it would not be correct to say that response to federal legislation is the primary reason for state concern with and development of regulatory legislation or that the primary purpose of state regulation is to help determine eligibility for federal funds, that the federal situation, and particularly abuses related to federal programs -- student aid and guaranteed loans -- have had a major catalytic impact in the last few years, would seem clear.

Third, there has been increased awareness within the states of the problems growing out of student unrest, of the impact of nontraditional forms of education and the opportunity these give not only to legitimate institutions but also to the less than scrupulous operators, of the general need for accountability, and of the issues and problems growing out of interstate as well as instate operation both of legitimate and marginal institutions. It was a combination of requests from states for guidance in developing effective legislation plus more formal requests from the academic community, represented by the Federation of Regional Accrediting Commissions of Higher Education and the Gould Commission on Nontraditional Study, that led to the formation of the Education Commission of the States Task Force on Model Legislation in 1971 and its report, adopted by the Commission in 1973. Incidentally, while there has been no rush of states to adopt it, it has had considerable impact. Five states have adopted versions of it. It is pending in two additional states, it has been used to help fill in gaps in existing legislation in two states, it is used as regulation in one state, and it has been used to review existing legislation in a number of states.

Fourth, of growing importance has been the movement for consumer protection in postsecondary education. The consumer movement is of long standing, but concern about students as consumers is of relatively recent origin. The first National Conference on Consumer Protection in Postsecondary Education

was held under the auspices of the Education Commission of the States in cooperation with several federal agencies in Denver in March of 1974. This Conference was attended by representatives of institutions, accrediting agencies, state regulatory agencies, student groups, consumer advocate groups and various federal agencies. The Conference helped crystallize a number of different concerns, including the fact that while students are considerably more than consumers they are also consumers, and as such have a right to adequate information, to protection against false advertising, and fraud, to due process, adequate means of expressing their concerns, and to reasonable refund policies. The first Conference was followed by a second in Knoxville in November of 1974 which addressed itself to specific recommendations for insuring reasonable information and protection for students. In the meantime the Federal Interagency Committee on Education, the Federal Trade Commission, the Office of Education, the Student Lobby, the Fund for the Improvement of Postsecondary Education, and finally the Congress, as well as state groups, have become involved with the issue in various ways, some salutory and some not. The movement has, and is, highlighting not only past abuses, ample as these are, but the positive aspects of providing students with the kinds of information relevant to effective choice as well.

Fifth, quite apart from the issue of eligibility for federal funds, the Congress, following on trends already developing in the states, did take action in the Education Amendments of 1972 which highlighted the regulatory issues on the state level by redefining the range of public concern from higher education and degree-granting institutions in the traditional sense to postsecondary education. The ball game on both state and federal levels was expanded to include public, private, and proprietary institutions, and programmatically everything from extension, correspondence, and short vocational skill programs to graduate and continuing education. The community of postsecondary education gained new importance and while the issues, problems, and structures of the various segments of postsecondary education differ in many respects, the recognition of the need for minimum operating assurances, consumer protection, and complementation of efforts extend, with some modifications, across the board.

The states have made major progress over the last decade and a half in developing more effective regulatory legislation and regulating agencies, but it has been uneven, and is, to some extent, piecemeal. Not all states have been equally concerned about exercising their regulatory powers. There still are some state legislators (very few) who espouse the principle of caveat emptor in relation to postsecondary education. The piecemeal approach in many states has been due not to any intent to fragment but to the fact that the issues, as they relate to different types of institutions and programs, have tended to be raised separately in the light of particularly pressing matters with the types of institutions in question. Thus, concern with diploma mills has led to the creation of regulatory agencies concerned with authorizing degree-granting institutions to operate and grant degrees; and such agencies have tended to be either free-standing or lodged with other agencies, most frequently boards of higher education. Concern with malpractice, false advertising and fraudulent and substandard operations in proprietary schools has given rise in all but two states to regulating or licensing agencies for proprietary schools, again either free-standing agencies or included in some other agencies, usually departments of education. Even in areas of public postsecondary vocational education and veterans approval, the states vary in their patterns for location of agencies, the

scope of their responsibilities, and their relation (if any) to other institutional regulatory or approval agencies in the state. In nursing education the responsibility for approval of programs rests with the state boards of nursing in most states with one exception (New York) such boards are not integrally related to other agencies with general oversight functions. The movement towards either coordination or consolidation of state oversight and approval functions in relation to different types of institutions has been relatively recent and, as yet, not particularly widespread.

The actual situation in the states is extraordinarily complex. As far as degree-granting isntitutions are concerned 11 states plus Puerto Rico have as yet no regulatory agencies or provisions for approval other than requiring incorporation. Of the 38 states with some form of approval agencies for degree-granting institutions 21 of these are under state coordinating or governing boards and 11 are within state departments of education. Three are, or are in, separate agencies and 3 are lodged in other state departments than education.

Only 2 states now have no regulatory agency for proprietary institutions. Forty-eight states plus the District of Columbia and Puerto Rico have proprietary institution regulatory agencies. Of these, 34 and Puerto Rico lodge their agencies within their boards of education. In 9 states plus the District of Columbia the agencies are separate or free-standing. In 2 states they are under or within state higher education agencies. In 3 states they are lodged in other noneducation departments of state government.

In 17 states, however, the private degree-granting agencies and the proprietary institution agencies are one and the same or under one agency. Twelve of these are under departments of education, 2 under state higher or postsecondary agencies, 2 are independent, and 1 is under an overarching agency.

All 50 states, the District of Columbia, and Puerto Rico have veterans approval agencies. However, these are not necessarily the same agencies as either degree-granting institution regulatory agencies or proprietary institution oversight agencies. In 10 states they are separate agencies altogether. In 28 states they are within departments of education, and in 4 states within state postsecondary education agencies; but in all cases, they may be, and usually are, separate units within these agencies.

At first glance the variety of agencies, their locations, and what must be admitted as considerable unevenness among them in funding, ability to carry out their functions, and even criteria for dealing with institutions might give rise to the question as to whether the states are in fact capable of carrying out their basic regulatory functions. And it must be admitted that some people on the federal level, including members of Congress, have asked exactly this question.

I would suggest, however, that the question already has been answered. There is another side to the picture, and one which it seems to me this seminar needs to concentrate on, one which the question overlooks. This other positive side of the picture involves a number of factors:

The first factor is that the development of state regulatory legislation and agencies is not and never was primarily a response to federal needs or

requirements. While, as noted, the federal issue of institutional eligibility has had an impact -- even in some cases a catalytic effect in encouraging some states to act -- not only does much state legislation and agency development antedate the issue of federal institutional eligibility, far more important, the development of state regulatory powers has been primarily to meet state needs. As in the case of New York in 1787, the basic question is the interest, educational needs, and welfare of the citizens of the state. Thus, whether there was federal legislation or not, the state responsibility for approving new institutions and authorizing institutions to operate persists and is broader than any question of eligibility for federal funds. The question of eligibility for federal funds has played very little, if any, role in the legislative debates on state levels giving rise to state regulatory legislation, even in the most recent cases of new or revised laws. The critical question then is not federal usage of state law, or even the relation of state law to accreditation, but is whether the needs of the citizens of the states are being met and these citizens are being protected against substandard and fraudulent operations in the name of education.

Second, granted that there are fifty states, plus territories, and more than fifty separate legislatures and governors involved, the number of states that have taken action in spite of strong opposition in some quarters and the increasing number today for which this is an issue is not only highly encouraging but in fact means that the question as to whether or not the states shall exercise basic regulatory powers over authorizing institutions to operate is no longer a real question. They are doing it. The agencies, while subject to modification and strengthening, are here to stay. The fact that there are gaps, (eleven in relation to degree-granting institutions and two in relation to proprietary schools) a far different situation than only a few years ago, only highlights the response of the majority of the states to need for effective regulatory legislation to meet their problems to date. Further, most of the states with gaps have legislation under discussion or actually under consideration. It is, in fact, remarkable that only two states, at this point still have no regulatory legislation for either degree-granting or preparatory institutions. The pressures from within, from the student consumer public, from the legitimate academic community, and from institutions denied authorization to operate in other states moving into these states all operate to encourage states to adopt legislation where it does not exist and strengthen it where it is weak or there are gaps.

Third, again given the number and variety of states it is not surprising that the agencies are differently organized in different states or that different agencies handle degree-granting institutions and proprietary institutions in many of the states. The probability of uniformity in approach among all the 50 states is practically zero. And this is not a bad thing. Again, the states differ in the seriousness of the problems by area. They differ in their existing and traditional educational structures. The purpose of model legislation is not to induce uniformity but to encourage consideration of the range of issues, to encourage some degree of comparability, and to help suggest areas that need to be filled in by additional legislation or with new or augmented agencies as necessary. What is important is not that there be a single comprehensive agency for all types of institutions in each state, as desirable theoretically as that might be, but that the existing agencies dealing with various types of institutions or different aspects of the problem work together in relation to the common goal of ensuring fiscal responsibility, institutional probity, and the ability of institutions to carry out their

announced educational goals, and protect the students and the public against fraudulent, substandard, and unreasonable actions by institutions regardless of the type of institution in question, that is, serving the best interests of the people of the state.

Fourth, while there is considerable variation in the effectiveness both of state laws and agencies, and these do include levels of funding, development of regulations, criteria in use, and even enforcement power, these are in part due to the stages of evolutionary development of the issue in the state in question and they may not be as wide as is sometimes assumed. A study completed by Joe Clark and the National Association of State Administrators and Supervisors of Private Schools in 1974 showed a rather high degree of uniformity among proprietary regulatory agencies in the use of common criteria. The situation has improved. One of the salutary functions of the Airlie House Conference of state officials responsible for authorizing degree-granting institutions to operate was discovery of their common problems and concerns, as well as different approaches to solving them. In the Belmont Conference lines between proprietary and degree-granting agencies began to be crossed. (This seminar has a primary opportunity to develop the ground work for effective common efforts to address the basic issues of agency operation, development of comparable criteria, and to establish a network of communication and complementary interstate cooperation.)

We have come a long way and while there still are rough edges, yes even gaps, again the remarkable aspect of the picture is not the gaps, the rough edges, or even the missing states, but the progress that has been made. It may be time to stop arguing about who does what, or what the role of state agencies are in the triad involved in institutional eligibility for federal funds vis-à-vis accrediting agencies or the federal government, at least that is clear from one standpoint. An institution must exist to be eligible for anything and the responsibility for authorizing it to exist rests with the states. (Instead, the basic concern of this group should be getting on with the business of serving the best interests of the people of the states in guaranteeing minimum competency of institutions to operate within their borders whether the institutions are resident or operating across state lines.)

But now a very quick look to the future. I can see no possibility that the kinds of functions you perform will not become even more critical in the years ahead. We already have talked about pressures and concerns under the general heading of the consumer movement in postsecondary education. You are well aware of them and we have reviewed some of the federal concerns. We stressed the fact that your primary responsibility is not to the federal government or to national movements but to the citizens in relation to postsecondary education in the states. Let us look for a moment at some of the trends in relation to postsecondary education in this states.

In spite of varying projections on enrollments it seems reasonably clear demographically that college and school populations of 18 to 22 year olds will drop until at least 1990. The competition for students will increase, and with it the temptation to seek students by any means. Both traditional and nontraditional institutions will be searching for new clients and developing programs, even new institutions, to serve older students. Extension, continuing education, and life-long learning have, and will increasingly become more central, so also will the need increase to effective and flexible approaches to authorizing institutions to operate. Such approaches should

not inhibit innovation and change, but should protect citizens from marginal and fraudulent operations.

Fiscally, the picture is not particularly bright. The competition for funds as well as the competition for students is likely to become more intense. Other priorities than education for state, federal and philanthropic funds, plus a still lingering disenchantment with higher education, suggest that even if the economy improves funds will remain tight for postsecondary education. In both public and private institutions, for both demographic and fiscal reasons, retrenchment seems much more likely than expansion and, in fact, now is here for many institutions and systems. These again heighten the importance of basic regulatory functions, not to throttle institutions or threaten them but to help insure basic integrity.

For the last few years legislative concern with accountability of public institutions and private institutions has increased to the extent at least that they receive public funds. Current concern in a number of states with performance audit is one part of the picture. You are part of that concern for accountability as it applies particularly to proprietary and private degree-granting institutions, not in terms of public funding but in relation to postsecondary educational integrity.

We are heading into a new period in which it will be vitally important not only that you communicate with each other, develop more adequate and at the same time more flexible criteria for dealing with institutional responsibility, but that you also involve and work with the institutions in the development of these criteria. Perhaps equally important is the necessity of working with those responsible in the state for statewide planning for postsecondary education, for the basic regulatory functions relate intimately to the questions of postsecondary educational resources and their utilization to meet public needs.

From this standpoint, you are not a subchapter or an eddy in the bureaucratic flow but essential to the mainstream of postsecondary education and its ability to adapt to changing circumstances with integrity.

We are facing difficult times. The road ahead will not be easy. While the states have made remarkable progress, there still is a long way to go. Many of the basic problems in licensure and approval are subjects for hard work at this seminar. There are cautions to be kept in mind. I am not suggesting in any sense that licensure and approval agencies become in any way little ministries of education. Your function is to protect them and their reputation against the substandard and fraudulent operators as well as to protect the students. There is need for more effective interchange of information, not only among states but within states. There are gaps to be filled in, legislation to be improved, regulations to be developed, and procedures to be carried out. There will be offers of technical assistance from federal and other sources which should be welcomed. This should be a working conference on the fundamental issues, problems and procedures involved in licensing and approval.

But it seems to me that if there is any basic principle that should inform and give perspective to the discussions and work sessions of this seminar, it goes back to the New York legislation of 1787 enjoining the Regents to serve "the best interests of the people of the State as a whole." If you keep this in mind, and the role of licensure and approval in relation to it, this could be one of the most fruitful and salutary seminars in the history of postsecondary education.